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No. 10-1148

Supreme Court, U.S.
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In The
Supreme Court of the United States

MCI SALES AND SERVICE, INC., *et al.*,

Petitioners,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Texas Supreme Court properly applied the Court's decision in *Geier v. American Honda Motor Co.* and the Fifth Circuit's decision in *O'Hara v. General Motors Corp.*, and correctly held that the Respondents' glass claims do not conflict with or present an obstacle to any significant federal regulatory objective expressed in Federal Motor Vehicle Safety Standard ("FMVSS") 205. Since the Texas Supreme Court's decision is consistent with *Geier* and *Williamson v. Mazda Motor of America, Inc.*, decided shortly after this case, have the Petitioners presented compelling reasons to grant the Petition?

2. The Texas Supreme Court properly applied the Court's decisions in *Geier v. American Honda Motor Co.*, *Freightliner Corp. v. Myrick*, and *Sprietsma v. Mercury Marine*, and correctly held that the Respondents' claims do not conflict with or present an obstacle to any significant federal regulatory objective expressed in FMVSS 208. FMVSS 208 does not address occupant protection of any kind for passengers in large motorcoaches – it is completely silent. As the Court noted in *Sprietsma* and *Myrick*, the absence of regulation ordinarily is not preemptive. Have the Petitioners presented compelling reasons to grant the Petition when the Texas Supreme Court's decision followed and is consistent with the relevant decisions of this Court?

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

3. The Texas Supreme Court applied the implied preemption framework described by the Court in *Geier*, *Sprietsma*, and *Myrick*, and followed by the Fifth Circuit in *O'Hara*, in deciding that neither FMVSS 205 nor FMVSS 208 preempt the Respondents' claims. The Texas Supreme Court's decision and the Fifth Circuit's decision in *O'Hara* are also consistent with *Williamson*. Since the Texas Supreme Court properly applied the relevant prior decisions of this Court, and its decision is also consistent with *Williamson*, have the Petitioners presented compelling reasons to grant the Petition?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

REASONS FOR DENYING THE PETITION 1

I. The Texas Supreme Court properly analyzed whether the glass claim is preempted by FMVSS 205 and correctly concluded it is not 3

A. FMVSS 205 is like the regulation in *Williamson* and unlike the regulation in *Geier*. Because the "choice" provided by the regulation does not involve a significant federal objective, FMVSS 205 does not preempt Hinton's glass claim 4

B. The Texas Supreme Court's decision and the Fifth Circuit's decision in *O'Hara v. General Motors Corp.* are consistent with *Williamson*. The West Virginia Supreme Court's decision in *Morgan v. Ford Motor Company* and the South Carolina Supreme Court's decision in *Priester v. Cromer* were incorrectly decided because they relied on an interpretation of *Geier* the Court rejected in *Williamson* 7

II. The Texas Supreme Court properly analyzed the seat belt claim and correctly concluded it is not preempted by FMVSS 208 9

TABLE OF CONTENTS – Continued

Page

A. FMVSS 208 is silent with regard to occupant protection for passengers in large motorcoaches 10

B. The history of NHTSA's consideration of passenger protection on large motorcoaches reveals nothing more than 30 years of regulatory inaction 12

1. The 1977 Indiana University Study..... 14

2. The 1992 letter from NHTSA's general counsel to MCI does not evidence a significant regulatory objective, and may have been wrong 15

3. NHTSA has recently proposed rules requiring seatbelts in large motorcoaches 16

C. The Texas Supreme Court's decision is consistent with *Myrick* and *Sprietsma*, which held that the failure to regulate ordinarily is not preemptive 17

III. MCI suggests the implied preemption analysis differs depending on the underlying federal statute at issue. But the Court's decisions consistently follow a single preemption framework predicated on the Supremacy Clause rather than a particular statute, and the Texas Supreme Court followed that framework..... 23

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES

Bic Pen Corp. v. Carter, 251 S.W.3d 500 (Tex. 2008) 27

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) ..... *passim*

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) ..... *passim*

Great Dane Trailers, Inc. v. Wells, 52 S.W.3d 737 (Tex. 2001) 27

Lake v. Memphis Landsmen, L.L.C., No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200 (Ten. Ct. App. Mar. 15, 2010) 7, 15

Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex. 1994), *cert. denied*, *Vivian Indus. Plastics v. Moore*, 513 U.S. 1057 (1994) 27

Morgan v. Ford Motor Co., 680 S.E.2d 77 (W. Va. 2009) 7

O'Hara v. General Motors Corp., 508 F.3d 753 (5th Cir. 2007) 4, 7, 8

Priester v. Cromer, 697 S.E.2d 567 (S.C. 2010), *vacated and remanded*, 562 U.S. ___ (2011) 7

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 22

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Williamson v. Mazda Motor of America, Inc., 562 U.S. ___ (2011) ..... *passim*

Wyeth v. Levine, ___ U.S. ___, 129 S. Ct. 1187 (2009) 17

STATUTES

49 C.F.R. § 571.100 *et seq.* 10

49 C.F.R. § 571.205 ..... *passim*

49 C.F.R. § 571.208 ..... *passim*

49 C.F.R. § 571.222 13

38 Fed. Reg. 4776 (Feb. 22, 1973) 12

39 Fed. Reg. 27585 (July 30, 1974) 12, 13

75 Fed. Reg. 50958 (Aug. 18, 2010) 17

OTHER

STANSIFER, ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES (Sept. 30, 1977) 14

REASONS FOR DENYING THE PETITION

In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court considered the preemptive effect of a regulation addressing the use of passive restraints in passenger vehicles. The regulation had a complex history and reflected a policy decision by the National Highway Traffic Safety Administration (NHTSA) to deliberately encourage a variety of passive restraint devices, including air bags. Because of this regulatory history and NHTSA's deliberate decision to promote a mix of different passive restraint options in motor vehicles, the Court held that a common law claim predicated on the failure of a manufacturer to pick a specific type of passive restraint – an air bag – was preempted.

Since *Geier*, numerous federal and state courts have considered the extent to which the Motor Vehicle Safety Act ("Safety Act" or "MVSA") preempts common law claims against vehicle manufacturers. In *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. ___ (2011), the Court clarified that *Geier* does not mandate preemption any time a manufacturer is deprived of a choice. Instead, in order to have preemptive effect, the *choice itself* must be a significant regulatory objective.

There are two federal regulations at issue in this case: FMVSS 205 regulates the glazing materials (or glass) that may be used in motor vehicles, and FMVSS 208 governs occupant protection in motor vehicles. FMVSS 205 permits manufacturers to use

either tempered glass or laminated glass in the side windows of vehicles, including large motorcoaches.[1] FMVSS 208 does not mandate any form of occupant protection for passengers in large motorcoaches; it only requires a seat belt for the driver's seating position.[2]

Petitioners MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. (collectively, "MCI") contend that the Respondents' (collectively, "Hinton")[3] common law product liability claims are preempted by these regulations. The Texas Supreme Court held that neither FMVSS 205 nor 208 preempt Hinton's claims. FMVSS 205 does not preempt Hinton's glass claim because the regulation merely recognizes that manufacturers must decide which option – tempered or laminated glass – is best suited for their vehicle. As in *Williamson*, that choice

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[1] "Large motorcoach" as used by Respondents means a bus that weighs greater than 10,000 pounds, since that is how FMVSS 208 is structured in terms of the motorcoach regulations. It is undisputed that the motorcoach at issue here weighed greater than 10,000 pounds.

[2] *See* 49 C.F.R. § 571.208 S4.4.3.1, which references S4.4.2.1, S4.4.2.2 for large buses (relevant excerpt included at MCI's App. 213). All of the FMVSS standards are codified at 49 C.F.R. § 571.xxx, where "xxx" represents the particular standard number. For example, FMVSS 205 is codified at 49 C.F.R. § 571.205.

[3] For ease of reference, the Respondents will collectively be referred to as "Hinton." Although there are several Respondents, the singular tense will be used unless the context requires otherwise.

does not involve a significant federal objective, so a common law claim predicated on the manufacturer's failure to use the safer glass is not preempted. FMVSS 208 does not preempt Hinton's seatbelt claim because the regulation is silent with regard to occupant protection for passengers, consistent with the Court's decisions in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

I. The Texas Supreme Court properly analyzed whether the glass claim is preempted by FMVSS 205 and correctly concluded it is not.

Hinton contended and the jury found that MCI's bus was defective because it should have been equipped with laminated glass in the side passenger windows, as MCI has done with most of its other buses for more than 35 years. MCI asserts Hinton's laminated glass claim is preempted because it conflicts with FMVSS 205. FMVSS 205 undoubtedly allows manufacturers to use either tempered glass or laminated glass in the side windows of vehicles, including motorcoaches. The question is whether the choice afforded by FMVSS 205 is a "*Geier* choice" or a "*Williamson* choice."

The Texas Supreme Court held FMVSS 205 presents manufacturers with a non-preemptive choice similar to the one this Court later analyzed in *Williamson*. The Fifth Circuit reached the same

conclusion in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). There is no compelling reason to grant the Petition because the Texas Supreme Court properly applied the correct rule of law and reached the correct decision.

A. FMVSS 205 is like the regulation in *Williamson* and unlike the regulation in *Geier*. Because the "choice" provided by the regulation does not involve a significant federal objective, FMVSS 205 does not preempt Hinton's glass claim.

The Texas Supreme Court's opinion details the relevant history and objectives of FMVSS 205. App. 16-19. The standard "specifies requirements for glazing materials for use in motor vehicles." App. 16. It states three objectives – to reduce injuries resulting from impact to glazing surfaces, to ensure adequate driver visibility, and to minimize the risk of occupants from being ejected through windows in collisions. App. 16-17, citing 49 C.F.R. § 571.205 S2 (reproduced at App. 211). FMVSS 205 permits manufacturers to use either tempered glass or laminated glass (sometimes referred to as "advanced glazing" or "safety glass") in side windows, though it requires laminated glass for windshields. App. 17-18.

MCI contends the choice afforded by FMVSS 205 has preemptive force, because the choice represents a significant regulatory objective. To be sure, NHTSA has carefully considered its regulation of

side windows and the appropriate materials to be used. As the Texas Supreme Court noted, the regulatory history of FMVSS 205 reflects "NHTSA's conclusion that no one type of glazing material is superior in all situations, and it leaves to manufacturers the decision of what kind of material – so long as it is one of the required kinds – to use in a particular setting." App. 19.

But the choice afforded by FMVSS 205 is not the same sort of choice the Court analyzed in *Geier*. The Court discussed in detail the extensive regulatory history of FMVSS 208 in *Geier* and its unique and specific regulatory framework, which was specifically designed to promote a variety of passive restraint devices, as well as a timeline for phasing in the more advanced devices such as air bags. *Geier*, 529 U.S. at 875-81.

FMVSS 205 has a different regulatory history. Its history simply reflects that there are advantages and disadvantages to both types of permissible glass, so it is up to the manufacturer to decide which type is best suited for its vehicle. For example, when NHTSA was considering mandating laminated glass in side windows, it focused on the ability of laminated glass to reduce the risk of passenger ejections. App. 18. But NHTSA received comments questioning whether a mandate requiring laminated glass might increase the risk of head and neck injuries for belted occupants. *Id.* Faced with these competing engineering issues, NHTSA decided to leave the decision up to manufacturers.

By way of further explanation of the competing engineering issues, the risk of ejection in passenger cars with relatively small side windows is lower, so perhaps tempered glass would be the better choice for such a vehicle. But the side windows in sport utility vehicles are typically larger, so perhaps laminated glass is a better choice. Likewise, in motorcoaches equipped with large, panoramic side windows (and no seat belts), perhaps laminated glass is the better choice because the risk of ejection is much higher. In fact, MCI uses laminated glass in almost all of its buses, just not the one involved in this accident. App. 97-98.

NHTSA's decision was not based on an affirmative desire to have a mixture of vehicles with laminated and tempered side glass. Rather, NHTSA's decision merely reflected that there was no clearly better single option, so manufacturers were expected to use their discretion and select the material best suited for their particular vehicle.

As with the option afforded manufacturers in *Williamson* to install two-point or three-point seat belts, the choice afforded manufacturers under FMVSS 205 does not advance a significant regulatory objective. A state law claim imposing liability on a bus manufacturer for not using the safer glass alternative will not frustrate the regulatory purposes expressed by NHTSA, so FMVSS 205 does not preempt Hinton's glass claim.

B. The Texas Supreme Court's decision and the Fifth Circuit's decision in *O'Hara v. General Motors Corp.* are consistent with *Williamson*. The West Virginia Supreme Court's decision in *Morgan v. Ford Motor Company* and the South Carolina Supreme Court's decision in *Priester v. Cromer* were incorrectly decided because they relied on an interpretation of *Geier* the Court rejected in *Williamson*.

Before *Williamson*, several courts struggled with the extent to which *Geier*'s reasoning applied to FMVSS 205. In *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009); *Priester v. Cromer*, 697 S.E.2d 567 (S.C. 2010), *vacated and remanded*, 562 U.S. ___ (2011); and *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200 (Ten. Ct. App. Mar. 15, 2010), the courts followed a broad view of *Geier*, holding that any time a regulation affords a manufacturer a choice between options, a common law claim that forecloses one of those options is preempted. *Morgan*, 680 S.E.2d at 94-95; *Priester*, 697 S.E.2d at 571; *Lake*, 2010 Tenn. App. LEXIS 200, at *8-9. Those courts acknowledged the Fifth Circuit had held such claims were not preempted in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). Yet they rejected *O'Hara* and followed the broad interpretation of *Geier*.

On the other hand, the Texas Supreme Court and the Fifth Circuit followed a more narrow view of

Geier, holding that "mere choice" is not enough to preempt – instead, the choice itself must implicate a significant federal objective. App. 40-42; *O'Hara*, 508 F.3d at 759-761. In discussing *Geier*, the Texas Supreme Court reasoned:

> The Supreme Court in *Geier* did not condemn a common-law rule merely because it foreclosed a choice under the relevant safety standard. Rather, the Court emphasized the purpose of the choice. . . . That is, the *choice itself* furthered the overall goal of safety, allowing manufacturers to experiment with different options and to build the public's confidence in the new technologies. . . . [W]hen *Geier*'s reasoning is oversimplified to find preemption based on a choice between two safety options and then exported to other safety standards where the unique text and history of FMVSS 208's passive restraint requirements are not relevant, we must respectfully disagree.

App. 41-42 (emphasis in original).

Although *Williamson* was decided after *O'Hara* and the Texas Supreme Court's decision in this case, both of those decisions are consistent with the explanation of *Geier* articulated by the Court in *Williamson*:

> In *Geier*, then, the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further

> significant regulatory objectives. Here, the same considerations indicate the contrary. We consequently conclude that, even though the state tort suit may restrict the manufacturer's choice, it does not "stand as an obstacle to the accomplishment of the full purposes and objectives" of federal law. Thus, the regulation does not pre-empt this tort claim.

Williamson, Slip Op. at 12.

FMVSS 205 affords a choice, but the choice does not further a significant regulatory objective. Rather, FMVSS 205 puts the burden on manufacturers to decide which choice is best suited for their vehicles. A common law claim that the manufacturer made the wrong choice will not obstruct the purposes and objectives of NHTSA and is not preempted.

If courts were confused about the extent to which *Geier* mandates preemption whenever a motor vehicle safety standard affords a choice among different options, the Court answered that question in *Williamson*. Thus, there is no compelling reason to grant the Petition.

II. The Texas Supreme Court properly analyzed the seat belt claim and correctly concluded it is not preempted by FMVSS 208.

The regulatory history of FMVSS 208 and large motorcoaches reveals that NHTSA simply has left

occupant protection for passengers in large motorcoaches unregulated since the Motor Vehicle Safety Act was adopted in 1966. In light of this history of regulatory inaction, the Texas Supreme Court correctly held Hinton's seatbelt claim is not preempted.

A. FMVSS 208 is silent with regard to occupant protection for passengers in large motorcoaches.

The various federal motor vehicle safety standards are codified at 49 C.F.R. § 571.100 *et seq*. They regulate a wide variety of matters, including brake hoses, brake fluid, tires, driver controls, and numerous other things. A number of standards address occupant protection. FMVSS 201, for example, addresses "Occupant protection in interior impact," and imposes several interior padding requirements to minimize injury when an occupant is involved in a collision. However, it excludes buses weighing more than 4,536 kilograms, or 10,000 pounds. FMVSS 202 regulates head restraints. It also excludes large buses. FMVSS 207 regulates "Seating systems," and applies to all buses. It "establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact." However, it specifically excludes "passenger seat[s] on a bus." FMVSS 207 S4.2. As a result, there are no requirements that govern bus passenger seat strength or whether or how those seats should even be attached to the floor of the bus.

FMVSS 208, the standard at issue in *Geier*, regulates "Occupant crash protection." It includes very detailed requirements regarding seatbelts and air bags (among other things) for all manner of vehicles. But in the section outlining requirements for buses, the requirements apply to the "driver only." Section 4.4.3 of FMVSS 208 applies to buses manufactured after September 1, 1991, which includes MCI's bus. It requires seatbelts for the passenger seats, but only for buses weighing *less* than 10,000 pounds. For large buses, like MCI's bus, the standard refers back to the requirements of sections 4.4.2.1 or 4.4.2.2, which apply only to the driver's seat. *See* App. 213-14.

FMVSS 214 regulates side impact protection, but it, too, excludes large buses. Likewise, FMVSS 216 governs roof crush resistance, but it excludes buses weighing more than 2,722 kilograms (approximately 6,000 pounds). In fact, the *only* federal motor vehicle safety standard that would apply to the seating in MCI's bus is FMVSS 302, "Flammability of interior materials."

NHTSA simply has not created any sort of regulatory framework that applies to passenger seating in large motorcoaches. Essential issues such as interior padding, head restraints and seat anchorages are not specified or even required for motorcoach passengers. There simply is no federal regulation that applies to occupant protection in large motorcoaches. In light of this absence of regulation, the Texas Supreme Court applied the rules of law expressed by this Court in

Geier, *Sprietsma*, and *Myrick* and correctly determined that Hinton's seat belt claim is not preempted by FMVSS 208.

B. The history of NHTSA's consideration of passenger protection on large motorcoaches reveals nothing more than 30 years of regulatory inaction.

In 1973, NHTSA published notice of a proposed new safety standard that would require all buses to have improved passenger seats. 38 Fed. Reg. 4776 (Feb. 22, 1973). The proposed seating standard included (1) performance requirements for seat strength; (2) standardized seat heights; (3) energy absorbing head impact zones; (4) energy absorbing knee impact zones; and (5) elimination of certain types of materials and design features.

As originally proposed, the standard would apply to all types of buses: school buses, intercity motorcoaches (like MCI's bus), and transit buses (city commuter buses). The proposed standard also included an alternative approach employing seatbelts and modifying some aspects of the proposed seat design rules.

In 1974, NHTSA substituted a new proposed standard on seat design, including very specific and technical specifications for school bus passenger seating. 39 Fed. Reg. 27585 (July 30, 1974). This standard was later codified as FMVSS 222, "School bus passenger seating and crash protection," at 49

C.F.R. § 571.222. Notably, the 1974 proposed standard applied only to school buses and expressly stated it did not apply to intercity motorcoaches or transit buses. Since 1976, school bus manufacturers have been required to comply with FMVSS 222, which details specifications for a seating system known as "school bus compartmentalization." "Compartmentalization" is a passive form of passenger protection that relies on specified and engineered seating compartments to protect passengers in a crash.

Unlike school buses, however, NHTSA has left motorcoach passenger seating completely unregulated. NHTSA explained in 1974 it decided to leave motorcoach passenger seating unregulated based on cost/benefit considerations and seatbelt usage statistics available at that time:

> The NHTSA has in fact determined that seating requirements for intercity and transit buses are not justified, based on benefit/cost studies of present seating performance in these buses. Injury statistics for intercity buses indicate that seating improvement would not reduce injuries substantially. Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided.

39 Fed. Reg. at 27585. As the Court noted in *Geier*, despite the universal belief among experts dating back to 1967 that seat belts would save lives, as late as 1984 estimates showed that only 12.5% of front

seat occupants in passenger vehicles utilized seat belts. *Geier*, 529 U.S. at 877. But since the advent of mandatory seat belt laws, the usage rates have increased dramatically. For example, according to NHTSA, usage rates in Texas exceeded 90% in 2008.[4]

Following its decision in 1974 not to regulate motorcoach occupant protection, NHTSA did not re-examine the issue until 2000. MCI asks this Court to give preemptive effect to this long history of non-action. A review of this chronology shows why MCI is incorrect.

1. The 1977 Indiana University Study.

MCI first discusses a study published in 1977 by Indiana University. STANSIFER, ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES. (Sept. 30, 1977). This study was not commissioned by NHTSA; it was commissioned by the Federal Highway Administration – a sister agency to NHTSA. As a result, it is a stretch to say the study is a reflection of NHTSA's policies or reasoning. Moreover, NHTSA did not take any action as a result of the study. The study acknowledges that NHTSA had failed to regulate bus passenger protection despite repeated recommendations by another federal agency,

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[4] *See* "Seat Belt Use in 2008 – Use Rates in the States and Territories," available at http://www-nrd.nhtsa.dot.gov/Pubs/811106.PDF (accessed on April 14, 2011).

the National Transportation Safety Board, to install passenger seatbelts on buses. *Id.* at 2. The purpose of the study was to essentially test the cost/benefit analysis used by NHTSA in 1974. *Id.* at 1. Not surprisingly, the study found that seatbelt usage rates were too low during the study period (1972-1976) to justify mandating seatbelts. *Id.* at 3. Nevertheless, the study confirmed that "[s]afety belt restraint systems can definitely produce a positive impact on death and injuries among intercity bus occupants." *Id.* at 101.

2. The 1992 letter from NHTSA's general counsel to MCI does not evidence a significant regulatory objective, and may have been wrong.

MCI next discusses the 1992 "Rice letter." *See* MCI Petition at 36; 39-40. Sometime in 1992, one of MCI's affiliates wrote a letter to NHTSA inquiring about the effect of a proposed New York state statute that would require seatbelts on motorcoaches. NHTSA's counsel sent a letter responding to MCI's inquiry and stated that the Motor Vehicle Safety Act's express preemption clause would preempt the proposed legislation, and went on to further claim that NHTSA had concluded there was no safety need for seatbelts on large motorcoaches.

MCI points to the Tennessee appellate court's decision in *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS

200 (Ten. Ct. App. Mar. 15, 2010), and its reliance on the Rice letter. MCI Petition at 40. But the Texas Supreme Court also discussed the Rice letter and took a more well-reasoned approach:

> We refuse to give preemptive force to this sentence for two reasons. First, there is nothing in this statement that indicates opposition to seatbelts and an affirmative desire to forbid their use. Second, to hold that NHTSA's decision not to regulate preempts state law based on a letter written eighteen years after the official decision illustrates the dangers of obstacle preemption grounded in agency musings. A letter, even by NHTSA's chief counsel, is not federal law, nor it is [sic] particularly persuasive regarding NHTSA's intent in the 1974 withdrawal. The text of the withdrawal notice is not technical or complex and speaks for itself; a later interpretation of that text is persuasive only to the extent it is correct.

App. 31 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

3. NHTSA has recently proposed rules requiring seatbelts in large motorcoaches.

The Texas Supreme Court's decision describes NHTSA's more recent efforts to study and adopt regulations requiring seatbelts for motorcoach passengers. App. 15-16. NHTSA announced plans to

study motorcoach passenger protection in 2000 in connection with Transport Canada, NHTSA's Canadian counterpart. App. 15. These efforts culminated in the release in 2007 and 2009 of two reports calling for rulemaking to require seatbelts for passengers in large motorcoaches, and NHTSA's issuance in 2010 of a Notice of Proposed Rulemaking that calls for three-point seatbelts for passenger seats in new motorcoaches. *Id.*; Federal Motor Vehicle Safety Standards; Motorcoach Definition; Occupant Crash Protection, 75 Fed. Reg. 50958 (Aug. 18, 2010) (to be codified at 49 C.F.R. pt. 571).

The regulatory history of FMVSS 208 shows NHTSA has left the issue of motorcoach passenger crash protection *un*regulated for more than 30 years. NHTSA has not required seatbelts or any form of compartmentalization or seat design parameters for passenger seats. NHTSA has simply left passenger protection decisions to the manufacturers' discretion. As the Court noted in *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 n. 14 (2009), "[A] tort case is unlikely to obstruct the regulatory process when the record shows that the [Agency] has paid very little attention to the issues raised by the parties at trial."

C. The Texas Supreme Court's decision is consistent with *Myrick* and *Sprietsma*, which held that the failure to regulate ordinarily is not preemptive.

The Court decided two cases addressing the question of whether an absence of regulation can

implicitly preempt common law claims such as Hinton's: *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). In both cases, the Court held that the absence of a regulation did not preempt the common law claims.

In *Sprietsma*, the plaintiff's wife fell out of a boat and was struck by the boat's propeller and killed. The plaintiff contended the boat should have been equipped with a propeller guard. The manufacturer argued the claim was preempted because the Coast Guard had specifically considered and rejected a regulation requiring propeller guards. 537 U.S. at 61. Part of the Coast Guard's reasoning for rejecting the proposed regulation was that the guards would increase the risk of certain types of injuries. *Id.* The manufacturer argued that the Coast Guard's decision not to require propeller guards reflected a clear intent *not* to regulate, which was in conflict with the plaintiff's tort claims. The Court disagreed:

> We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States . . . from adopting such a regulation. . . . The Coast Guard did not take the further step of deciding that, as a matter of policy, the States . . . should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as

> unsafe. . . . Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of federal policy against propeller guards.

537 U.S. at 61.

MCI contends *Sprietsma* is inapplicable because it involves interpretation of the Federal Boat Safety Act of 1971 (FBSA) rather than the Motor Vehicle Safety Act (MVSA). But the FBSA imposed a statutory framework that is essentially identical to the MVSA for preemption purposes. Like the MVSA, which the Court construed in *Geier*, the FBSA contains both an express preemption clause and a saving clause. *See Geier*, 529 U.S. at 867-68; *Sprietsma*, 537 U.S. at 58-59. In both cases, the Court held the express preemption clauses did not preempt common law claims, based in part on the presence of saving clauses in both statutes. In *Geier*, the Court held the regulation regarding occupant protection implicitly preempted the plaintiff's claim that the manufacturer was obligated to install an air bag. In *Sprietsma*, the Court held the decision of the Coast Guard not to mandate propeller guards did not preempt the plaintiff's claim.

MCI goes to great lengths in an attempt to convince the Court that *Sprietsma* is not applicable and the Texas Supreme Court erred in considering it. But *Sprietsma* was decided after *Geier*, was based on a statute that had a similar preemption framework

(i.e., an express preemption clause and a saving clause), and *Geier* is cited throughout the *Sprietsma* opinion. The rules of law applicable to implied conflict preemption are consistent in both decisions, and the Texas Supreme Court's decision is consistent with both *Sprietsma* and *Geier*.

Another decision of the Court is particularly instructive, though MCI does not discuss it. In *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Court considered the preemptive effect of a regulation under the MVSA that was silent with regard to the particular safety device at issue. The plaintiffs alleged that tractor-trailers manufactured by the defendants were defective because they lacked an antilock braking system (ABS). Like FMVSS 208 and motorcoach occupant protection, the regulation at issue in *Myrick*, FMVSS 121, did not include any requirement or prohibition regarding ABS brakes. *Id.* at 286.

The Court held "the absence of a federal standard cannot implicitly extinguish state common law." *Id.* at 282. The Court further stated,

> In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would

> undermine no federal objectives or purposes with respect to ABS devices, since none exist.

Id. at 289-90. The situation here is identical to *Myrick*: there is no applicable standard requiring or prohibiting seatbelts in motorcoaches, so Hinton's claim does not conflict with federal law. The Texas Supreme Court applied the proper rules of law and correctly held that Hinton's seatbelt claim is not preempted by FMVSS 208, consistent with *Sprietsma* and *Myrick*.

MCI suggests throughout its petition that the "significant federal objective" implicated by FMVSS 208's silence regarding motorcoach passenger protection is some sort of amorphous and undefined "other types of occupant protection"[5] or "a different safety method."[6] But as discussed above, the regulations belie this contention. MCI advanced this same argument in the Texas Supreme Court, which that court rejected: "Thus, it is inaccurate to suggest that NHTSA chose an alternate method to protect passengers; instead, NHTSA chose not to regulate seating design or seatbelts in motorcoaches, a decision that does not have preemptive force for the reasons explained above." App. 33.

In this regard, MCI has incorrectly described the Texas Supreme Court's holding. On page 15 of their

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[5] MCI's Petition, p. 37.

[6] MCI's Petition, p. 41.

Petition, MCI states the Texas Supreme Court ruled "for a safety regulation to have preemptive force, the agency must 'affirmatively' take the 'further step to disallow state regulation' – i.e., 'indicate[ ] opposition to seatbelts and an affirmative desire to forbid their use.'" But this misstates what the Texas Supreme Court said; the court was discussing whether and to what extent regulatory *inaction* could give rise to preemption. After discussing *Sprietsma*, *Myrick*, and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Texas Supreme Court said,

> From these cases, it follows that an agency's mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter of policy. Unless the agency takes this "further step" to disallow state regulation, its decision not to regulate has no preemptive force.

App. 28 (citing *Sprietsma*, 537 U.S. at 67).

MCI cannot identify a single regulation that presents an actual conflict with Hinton's seatbelt claim because there simply is no federal regulation regarding passenger occupant protection in large motorcoaches. MCI mentions one specific "safety method" in its petition that can be potentially misleading – compartmentalization. As mentioned above,

FMVSS 222 addresses "compartmentalization," which refers to the use of engineered seat design in an effort to protect passengers on buses. But FMVSS 222 only applies to school buses – not motorcoaches. *See* FMVSS 222 S3. And MCI admitted at trial that its bus did not comply with the compartmentalization requirements of FMVSS 222 anyway.

The FMVSS standards that govern occupant protection in vehicles simply do not apply to large motorcoach passengers – only the driver. Frankly, the degree to which NHTSA has left motorcoach passenger protection unregulated over the years is remarkable. In light of this lack of regulation, the Texas Supreme Court properly applied the preemption rules set forth by the Court in *Sprietsma* and *Myrick* and correctly determined that Hinton's seatbelt claim is not preempted.

III. MCI suggests the implied preemption analysis differs depending on the underlying federal statute at issue. But the Court's decisions consistently follow a single preemption framework predicated on the Supremacy Clause rather than a particular statute, and the Texas Supreme Court followed that framework.

The Court granted certiorari in *Geier* in order to resolve a conflict among various state and federal courts about the preemptive effect of the Safety Act. *Geier*, 529 U.S. at 866. Some courts had held that the express preemption clause of the Safety Act preempts

"any safety standard" (including common law claims) that is not identical to the "same aspect of performance" addressed by the particular FMVSS. *Id.* at 865-66. Other courts had held that the Safety Act did not preempt "no air bag" suits like *Geier* at all. *Id.* at 866. The court of appeals in *Geier* rejected both of these approaches and considered the preemptive effect of the Safety Act using traditional conflict preemption analysis, as several other federal circuit courts had previously done. *Id.* at 865-66.

The Court resolved these conflicts in *Geier*, holding that the express preemption clause of the Safety Act does not preempt common law claims, and preemption with respect to regulations under the Safety Act must be analyzed using traditional conflict preemption principles. *Id.* at 866-67.

The Court analyzed how the express preemption clause and the saving clause should be construed in order to give effect to each:

> Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions [i.e. common law tort actions], for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely

> established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence, the broad reading cannot be correct. The language of the [express] pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the [express] pre-emption clause must so be read.

Id. at 868. After concluding the express preemption clause does not preempt common law tort claims, the Court discussed whether the saving clause required a different sort of analysis than traditional conflict preemption principles:

> We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder?
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> * * *

> We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

Id. at 869 (emphasis in original). The dissent argued the saving clause imposed a "special burden" on a party claiming preemption, which the majority rejected. Instead, the majority held, neither the express pre-emption clause nor the saving clause had priority or supremacy over the other:

> Neither do we believe that the preemption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles – which "special burden" would specially disfavor pre-emption here. The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict preemption principles.

Id. at 870-71 (internal citation omitted). The Court later followed the same analytical framework in *Sprietsma*, and reiterated it in *Williamson*.

The Texas Supreme Court followed the Court's decisions in *Geier*, *Myrick*, and *Sprietsma*, each of which articulates a consistent approach to implied conflict preemption. Though *Williamson* was decided after the Texas Supreme Court decided this case, the court correctly predicted that "choice" preemption was not as broad as some other courts had held, or as MCI contended. In fact, the Texas Supreme Court has

extensive experience with implied preemption. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), *cert. denied*, *Vivian Indus. Plastics v. Moore*, 513 U.S. 1057 (1994) (pre-*Sprietsma*, holding plaintiff's claim based on lack of propeller guard not preempted by Federal Boat Safety Act); *Great Dane Trailers, Inc. v. Wells*, 52 S.W.3d 737 (Tex. 2001) (holding FMVSS 108 is minimum standard that does not preempt common law claim); *Bic Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008) (claim against manufacturer of disposable lighter impliedly preempted by Consumer Product Safety Commission regulations).

Applying the "ordinary conflict preemption principles" set forth by this Court, the Texas Supreme Court correctly held Hinton's seatbelt and glass claims are not preempted by FMVSS 208 or FMVSS 205, so there are no compelling reasons to grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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